Hongkong Bank Malaysia Bhd v Sereedevi (t/a as SD Rest House)

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12-14 OF 1997
AUGUSTINE PAUL JC
20 JUNE 1997

Civil Procedure *— Appeal — Appeal against interlocutory order — Whether it was necessary in an appeal under O 49 r 6 of the Subordinate Courts Rules 1980 to include in the appeal record the notes of evidence, the grounds of judgment and memorandum of appeal — Subordinate Courts Rules 1980 O 49 rr 3A(3) & 6 — Rules of the High Court 1980 O 55 r 2*

Civil Procedure *— Judicial precedent — Decision not made in course of hearing an appeal — Whether dismissal of application for leave to appeal by a court can be taken as a decision of that court on merits — Whether such decision is binding on lower courts*

The plaintiff ('the appellant') had filed an application for summary judgment against the defendant ('the respondent') pursuant to O 26A of the Subordinate Courts Rules 1980 ('the SCR'). The sessions court judge dismissed the application. The appellant appealed against the decision in accordance with O 49 r 6 of the SCR.

At the commencement of the hearing of the appeal, the respondent raised a preliminary objection to the effect that the appeal was not properly before the court as O 49 r 3A(3) of the SCR and O 55 r 2 of the Rules of the High Court 1980 ('the RHC') had not been complied with as the grounds of judgment, notes of evidence and memorandum of appeal had not been filed. The respondent relied, inter alia, on *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 (CA) ('*Yupaporn*'). In *Yupaporn*, the Court of Appeal in refusing an application for leave to appeal stated that O 49 r 6(3) of the SCR cannot be understood to mean that it has abrogated the requirement of O 55 r 2 of the RHC. The appellant contended that the objection raised was without merit as O 49 r 6 of the SCR specifically states that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal. The appellant relied on the High Court decisions in *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd* [1996] 2 CLJ 1038 ('*Pembinaan Nadzri Sdn Bhd*') and *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 ('*Vong Ban Hin*'), both decided after *Yupaporn*, but did not apply the observation made in the latter.

The issues were whether: (i) on the construction of the O 49 r 6 of the SCR, it was necessary in an appeal under O 49 r 6 of the SCR to include in the appeal record a copy each of the notes of evidence, the grounds of judgment and memorandum of appeal; and (ii) the court was bound by the Court of Appeal case of *Yupaporn*.

Held, dismissing the preliminary objection:

Though O 49 r 6 conflicts with the provisions relating to an appeal under O 49 r 2 pursuant to which an appeal record must contain the

notes of evidence and grounds of judgment and which requires Form 141 to be served on the appellant, the qualifying words in O 49 r 6(1) 'Notwithstanding anything contained in this Order ... ' make those requirements inapplicable to an appeal under O 49 r 6 thereby making the rule a separate and independent provision. There is absolutely no conflict between O 55 r 2(1) of the RHC and O 49 r 6 of the SCR as the former states in crystalline terms that an appellant shall file a memorandum of appeal when he has been served with a '... notice in Form 141 under Order 49 rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be) ... '. Thus O 55 r 2 of the RHC is confined in its operation to appeals filed under O 49 r 2 of the SCR. Order 49 r 6 is not affected in any way by the requirements stipulated in O 49 r 2 of the SCR. The corollary is that in an appeal under O 49 r 6 of the SCR there is no requirement to include in the appeal record the notes of evidence and the grounds of judgment. Neither is there any requirement to file any memorandum of appeal. This interpretation ensures that the words employed in the rules are given their natural meaning without being treated as superfluous or insignificant (see pp 613F–I and 614A–B); *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113, *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 and *Perdana Finance Bhd v Azmi Ahmad & Ors* [1997] 2 CLJ 325 not followed; *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 distinguished; *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd* [1996] 2 CLJ 1038 and *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 followed.

Per curiam:

(1) The observations made by the Court of Appeal in *Yupaporn* were not made in the course of hearing an appeal but while dismissing an application for leave to appeal. Refusal of leave to appeal against a decision of the High Court by the Court of Appeal, as in *Yupaporn*'s case, gives the High Court judgment the same authority as any other unappealed judgment of the High Court. It therefore follows that the High Court decision of *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 (approved by *Yupaporn* on this point) and the decision made in *Yupaporn*'s case at the High Court level do not enjoy an elevated status as a result of the observations made by the Court of Appeal. Accordingly, the views expressed in *Pembinaan Nadzri Sdn Bhd* (and subsequently *Vong Ban Hin*) that in an appeal under O 49 r 6 of the SCR there is no need to file a memorandum of appeal do not impinge upon the doctrine of stare decisis in any way (see p 616D–H); *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 followed.

(2) The dismissal of an application for leave to appeal by a court cannot be taken as a decision of that court on merits. As there is no decision on the appeal on merits, the question of any ratio

decidendi flowing from what was said in the course of refusing leave to appeal does not arise. Therefore, there is no way in which any ratio decidendi can lawfully be culled from anything said by the court while making the ruling. The reasons given by a court in refusing or giving leave to appeal serve a limited purpose (see p 618D–I); *Penang Port Commission lwn Kanawagi a/l Seperumaniam* [1997] 2 MLJ 302 and *Smith v Cosworth Casting Processes Ltd, The Times* 28 March 1997 followed.

[Bahasa Malaysia summary

Plaintif ('perayu) telah memfailkan suatu permohonan untuk penghakiman terus terhadap defendan ('penentang') menurut A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Hakim mahkamah sesyen telah menolak permohonan tersebut. Plaintif telah merayu terhadap keputusan itu menurut A 49 k 6 KMR.

Pada permulaan pembicaraan rayuan, penentang telah membangkitkan suatu bantahan permulaan bahawa rayuan itu tidak dikemukakan dengan betul di hadapan mahkamah oleh kerana A 49 k 3A(3) KMR dan A 55 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak dipatuhi memandangkan alasan penghakiman, nota-nota keterangan dan memorandum rayuan tidak difailkan. Antara lain, penentang bergantung kepada *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 (MR) ('*Yupaporn*'). Dalam *Yupaporn*, dalam menolak satu permohonan untuk kebenaran merayu Mahkamah Rayuan menyatakan bahawa A 49 k 6(3) KMR tidak boleh difahamkan sebagai bermakna ia telah memansuhkan keperluan A 55 k 2 KMT. Perayu berhujah bahawa bantahan yang dibangkitkan tidak mempunyai merit kerana A 49 k 6 KMR dengan khususnya memperuntukkan bahawa rekod rayuan tidak harus mengandungi nota keterangan, alasan penghakiman atau sebarang memorandum rayuan. Perayu bergantung kepada keputusan Mahkamah Tinggi dalam *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd* [1996] 2 CLJ 1038 ('*Pembinaan Nadzri Sdn Bhd*') dan *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 ('*Vong Ban Hin*'), kedua-duanya diputuskan selepas *Yupaporn*, tetapi tidak memakai pemerhatian yang dibuat dalam kes *Vong Ban Hin*.

Isu-isu adalah sama ada: (i) atas tafsiran A 49 k 6 KMR, adalah perlu dalam suatu rayuan di bawah A 49 k 6 KMR untuk memasukkan dalam rekod rayuan sesalinan setiap nota keterangan, alasan penghakiman dan memorandum rayuan; dan (ii) mahkamah adalah terikat oleh kes Mahkamah Rayuan iaitu *Yupaporn*.

Diputuskan, menolak bantahan permulaan:

Walaupun A 49 k 6 bertentangan dengan peruntukan-peruntukan berkenaan dengan rayuan di bawah A 49 k 2 yang menghendaki sesuatu rekod rayuan mengandungi nota keterangan dan alasan penghakiman dan yang memerlukan Borang 141 disampaikan kepada perayu, perkataan-perkataan bersyarat dalam A 49 k 6(1) 'Walau apa

pun apa-apa jua yang terkandung dalam Aturan ini ... ' menyebabkan keperluan tersebut tidak terpakai kepada suatu rayuan di bawah A 49 k 6 dan dengan itu menjadikan kaedah tersebut suatu peruntukan yang bebas dan berasingan. Tidak ada sebarang konflik di antara A 55 k 2(1) KMT dan A 49 k 6 KMR kerana A 55 k 2(1) KMT dengan jelasnya menyatakan bahawa seseorang perayu mesti memfailkan suatu memorandum rayuan apabila telah disampaikan dengan suatu '... notis dalam Borang 141 di bawah Aturan 49 kaedah 2 sub-kaedah (4) atau kaedah 3 sub-kaedah (2) Kaedah-Kaedah Mahkamah Rendah 1980 (mengikut mana yang berkenaan) ... '. Maka A 55 k 2 KMT adalah terhad dalam operasinya kepada rayuan-rayuan yang difailkan di bawah A 49 k 2 KMR. Aturan 49 k 6 tidak terjejas oleh keperluan yang ditetapkan dalam A 49 k 2 KMR dalam apa-apa cara. Kesimpulannya adalah dalam suatu rayuan di bawah A 49 k 6 KMR, nota-nota keterangan dan alasan penghakiman tidak perlu dimasukkan ke dalam rekod rayuan. Memorandum rayuan juga tidak perlu difailkan. Tafsiran ini memastikan bahawa perkataan-perkataan yang digunakan dalam kaedah-kaedah diberikan makna yang biasa tanpa dianggap tidak diperlukan atau tidak penting (lihat ms 613F–I dan 614A–B); *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113, *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 dan *Perdana Finance Bhd v Azmi Ahmad & Ors* [1997] 2 CLJ 325 tidak diikut; *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 dibeza; *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd* [1996] 2 CLJ 1038 dan *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 diikut.

Per curiam:

(1) Pemerhatian yang dibuat oleh Mahkamah Rayuan dalam kes *Yupaporn* tidak dibuat dalam perjalanan perbicaraan suatu rayuan tetapi dibuat semasa menolak suatu permohonan untuk kebenaran merayu. Penolakan permohonan untuk kebenaran merayu terhadap keputusan Mahkamah Tinggi oleh Mahkamah Rayuan, sepertimana dalam kes *Yupaporn*, memberikan keputusan Mahkamah Tinggi itu kuasa yang sama seperti keputusan-keputusan Mahkamah Tinggi yang lain yang tidak dirayu. Ini bermakna bahawa keputusan Mahkamah Tinggi dalam *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 (yang diikut oleh *Yupaporn* atas hujah ini) dan keputusan yang dibuat dalam kes *Yupaporn* di tahap Mahkamah Tinggi tidak menikmati taraf yang lebih tinggi akibat pemerhatian yang dibuat oleh Mahkamah Rayuan. Oleh itu, pandangan-pandangan yang dinyatakan dalam kes *Pembinaan Nadzri Sdn Bhd* (dan kemudiannya *Vong Ban Hin*) bahawa di dalam suatu rayuan di bawah A 49 k 6 KMR memorandum rayuan tidak perlu difailkan tidak melanggar doktrin stare decisis dalam apa-apa cara (lihat ms 616D–H); *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 diikut.

(2) Penolakan sesuatu permohonan untuk kebenaran merayu oleh mahkamah tidak boleh dianggap sebagai suatu keputusan mahkamah tersebut berdasarkan merit. Oleh kerana tiada keputusan atas rayuan berdasarkan merit, persoalan tentang apa-apa ratio decidendi yang berpunca daripada apa yang dikatakan sewaktu menolak kebenaran merayu tidak berbangkit. Maka, tiada cara dalam mana apa-apa ratio decidendi boleh didapati secara sah daripada apa yang dikatakan oleh mahkamah semasa membuat keputusan. Alasan yang diberikan oleh mahkamah dalam menolak atau memberikan kebenaran merayu hanya mempunyai kegunaan yang terhad (lihat ms 618D–I); *Penang Port Commission lwn Kanawagi a/l Seperumaniam* [1997] 2 MLJ 302 dan *Smith v Cosworth Casting Processes Ltd, The Times* 28 Mac 1997 diikut.]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on judicial precedent, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2067–2090.

Cases referred to

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samy Kano [1997] 1 MLJ 94 (refd)

Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)

Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd [1996] 2 CLJ 1038 (folld)

Perdana Finance Bhd v Azmi Ahmad & Ors [1997] 2 CLJ 325 (not folld)

Penang Port Commission lwn Kanawagi a/l Seperumaniam [1997] 2 MLJ 302 (folld)

Smith v Cosworth Casting Processes Ltd, The Times 28 March 1997 (folld)

Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 (not folld)

Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co [1996] 3 AMR 3908 (not folld)

Vong Ban Hin v Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 (folld)

Yupaporn Seangarthit v Neil Allen Campbell Webb [1995] 3 MLJ 705 (distd)

Legislation referred to

Interpretation Act 1967 s 3

Rules of the High Court 1980 O 55 r 2

Subordinate Courts Rules 1980 O 26A, O 49 rr 2, 6

Karen Cheah Yee Lynn (*Nik Hussain & Partners*) for the appellant.

Ravinathan Muthiah (*Ravi Muthiah & Co*) for the respondent.

Augustine Paul JC: In this case, the plaintiff had filed an application for summary judgment against the defendant pursuant to O 26A of the Subordinate Courts Rules 1980 ('the SCR'). The learned sessions court judge dismissed the application. The plaintiff appealed against the decision in accordance with O 49 r 6 of the SCR.

At the commencement of the hearing of the appeal, learned counsel for the respondent raised a preliminary objection to the effect that this appeal is not properly before the court as O 49 r 3A(3) of the SCR and O 55 r 2 of the Rules of the High Court 1980 ('the RHC') have not been complied with as the grounds of judgment, notes of evidence and memorandum of appeal have not been filed. In support of his argument, learned counsel referred to *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 and *Perdana Finance Bhd v Azmi Ahmad & Ors* [1997] 2 CLJ 325. In her reply, learned counsel for the appellant contended that the objection raised is without merit as O 49 r 6 of the SCR specifically states that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

In recent times, the proper interpretation to be accorded to O 49 r 6 of the SCR has vexed the minds of the courts. In order to resolve the objection raised before me, I consider it necessary to reproduce O 49 of the SCR and O 55 r 2 of the RHC.

Order 49 of the SCR:

1 In this Order 'decision' includes 'judgment', 'order' and 'decree'.

2 (1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140. A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court.

(2) An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of.

(3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.

(4) As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.

(5) Within 14 days from the receipt of the notification, the appellant shall, unless the Court for sufficient cause otherwise orders —

(a) deposit in the Court appealed from a sum which in the opinion of the Registrar will cover the costs of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and

(b) lodge in the Court appealed from a sum of two hundred and fifty ringgit, or such lesser sum as the Court may in any case direct, by way of security for the costs of the appeal.

(6) The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the

appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

3 (1) ...

3A (1) When the appellant who is represented by a solicitor has complied with the requirements of rule 2 of this Order, the appellant shall prepare the requisite number of copies of the appeal record and the record shall contain copies of —

(a) the relevant pleadings;

(b) the notes of evidence;

(c) the grounds of judgment, provided that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal;

(d) the decision;

(e) the notice of appeal;

(f) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.

(2) If the appellant shall consider that any documentary exhibit used need not be included in the record, he shall obtain the consent in writing of all parties to the appeal to the omission of the document from the record. Such written consent shall be included in the appeal record.

(3) Two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.

(4) The appellant shall within the period limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

4 The filing of a notice of appeal shall not operate as a stay of execution but the Court may on application and on sufficient cause being shown stay execution on such terms as it may think fit.

5 When either party has extracted the order of the High Court on any appeal and has produced the order to the Subordinate Court appealed from, the Subordinate Court shall execute the order in accordance with the provisions of these Orders and Rules.

6 (1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

(2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

(3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of —

(a) the application for the decision;

(b) the statement of claim, and where defence has been filed, the statement of defence;

(c) all affidavits filed in support of or in opposition to the application; and

(d) the decision appealed from, A

but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

Order 55 of the RHC:

1 On receiving an appeal record under Order 49 of the Subordinate Courts Rules 1980 the Registrar shall enter the appeal in a list of appeals from Subordinate Courts. B

2(1) The appellant shall, within 14 days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of C appeal in Form 113A.

(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

Before I embark on a consideration of the issue before me, it is perhaps necessary to bear in mind one of the most fundamental rules of statutory D interpretation which is contained in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samy Kano* [1997] 1 MLJ 94 where Gopal Sri Ram JCA in delivering the judgment of the Federal Court said at pp 100–101:

> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain Legislative intent primarily by reference to E the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that: F
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> > 'As a general rule a court will adopt that construction of a statute which will give some effect to all the words which it contains. (Per Gibbs J in *Beckwith v R* (1976) 12 ALR 333 at p 337.)'
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> See also *Commonwealth v Baume* (1905) 2 CLR 405 at p 414, per Griffith CJ. G
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> Where it is impossible to give a full and accurate meaning to every word appearing in a section of a statute, the duty of the court is to give the words an interpretation 'that produces the greatest harmony and the least inconsistency': *Australian Alliance Assurance Co Ltd v Attorney General (Queensland)* [1916] QSR 135 at p 161, per Cooper CJ.

The applicability of his Lordships' salutary advice to the interpretation of H the SCR and the RHC is beyond doubt as they constitute subsidiary legislation within the meaning of s 3 of the Interpretation Act 1967. In this regard, I refer to *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 where Edgar Joseph Jr J (as he then was) in considering the RHC said at p 148: I

> ... The Rules of the High Court 1980 were enacted in exercise of the powers conferred by s 70 of the Courts of Judicature Act 1964, with the consent of the Chief Justices of Malaya and Borneo and the Rules Committee and are

A comprised in PU (A)50 which is clearly subsidiary legislation within the meaning of s 3 of the Interpretation Act 1967. The rules in my opinion, therefore, have statutory force and are not mere rules of practice.

Order 49 of the SCR provides for two modes of appeal from a decision of the subordinate courts to the High Court. The first mode is as contained B in r 2. Upon an appeal being filed under r 2(1), the court appealed from shall, in accordance with r 2(3), thereupon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision. As soon as the certified copies are ready, the court must inform the appellant in Form 141 as required by C r 2(4). Pursuant to r 2(5), the appellant must then deposit a sum which will cover the cost of preparing the appeal record. Within 14 days from the date of service on him of the notice in Form 141, the appellant is required by O 55 r 2 of the RHC to file in the High Court a memorandum of appeal in duplicate. I interpolate to add that an appellant requires the notes of D evidence and grounds of judgment to enable him to file the memorandum of appeal without which he cannot do so. The second mode of appeal as contained in O 49 r 6 of the SCR was introduced by PU (A) 193 of 1993 with the object of allowing litigants to appeal against interlocutory orders made by magistrates and sessions court judges. Prior to this amendment, an appeal may lie only against a final decision. In view of the large number E of appeals that may arise under the new provision thereby resulting in increased workload for the subordinate court officers, the Rules Committee, in its wisdom, has provided in O 49 r 3 that the appeal record:

> ... shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

F The meaning of these words in O 49 r 6 is too plain to be reasoned. Though they conflict with the provisions relating to an appeal under O 49 r 2 pursuant to which an appeal record must contain the notes of evidence and grounds of judgment and which requires Form 141 to be served on the appellant, the qualifying words in O 49 r 6(1), 'Notwithstanding G anything contained in this Order ... ' make those requirements inapplicable to an appeal under O 49 r 6 thereby making the rule a separate and independent provision. The only other matter that requires consideration is whether this rule conflicts with O 55 r 2(1) of the RHC which requires a memorandum of appeal to be filed by the appellant upon him being served with the notice in Form 141. In my opinion, there is absolutely no H conflict between O 55 r 2(1) of the RHC and O 49 r 6 of the SCR as the former states in crystalline terms that an appellant shall file a memorandum of appeal when he has been served with a '... Notice in Form 141 under Order 49 rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be) ... '. Thus, O 55 r 2 of the RHC I is confined in its operation to appeals filed under O 49 r 2 of the SCR. I have already said that O 49 r 6 is not affected in any way by the requirements stipulated in O 49 r 2 of the SCR. Thus, the patent language employed in O 55 r 2(1) of the RHC makes it incapable of extension to cover an appeal filed under O 49 r 6 of the SCR. Instead, when the appeal

record under O 49 r 6 of the SCR is received by the High Court, the registrar shall act under O 55 r 1 of the RHC and enter it in the list of appeals. In my opinion, the language of O 49 r 6 of the SCR and O 55 r 2(1) of the RHC do not leave room for any ambiguity. The corollary is that in an appeal under O 49 r 6 of the SCR there is no requirement to include in the appeal record the notes of evidence and the grounds of judgment. Neither is there any requirement to file any memorandum of appeal. This interpretation ensures that the words employed in the rules are given their natural meaning without being treated as superfluous or insignificant.

Indeed, the practice has been that the subordinate courts, in matters of appeal pursuant to O 49 r 6 of the SCR, do not provide the appellants with the notes of evidence and grounds of decision because of the understanding of the exclusion clause in O 49 r 6(3) itself and following the practice in the High Court where the registrar is not required to supply the notes and the grounds in interlocutory appeals. But alas, all these have changed with the decision of the Court of Appeal in *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 which binds the High Courts and the subordinate courts. So said Abdul Kadir Sulaiman J in *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 and added at p 3913:

> ... Owing to this binding decision upon courts subordinate to the Court of Appeal, up to now, many appeals in the High Court pursuant to O 49 r 6 of the SCR are stalled because of the absence of notice in Form 141 from the subordinate courts and the memorandum of appeal. The hearing of appeal cannot proceed until a supplementary record of appeal is filed enclosing the notes of evidence, and the grounds of judgment and the filing of the memorandum of appeal which greatly depends on the speed the Form 141 is issued.

The problem with the interpretation of O 49 r 6 of the SCR commenced with *Sykt Kayu Bersatu Sdn Bhd & Ors v UMV (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 where Richard Malanjum J held that in an appeal under that rule, the court appealed from should comply with O 49 r 2 and other relevant provisions so as to enable the appeal to be brought before the High Court with the result that Form 141 must be issued. His Lordship further held that the appellant must file the memorandum of appeal as required by O 55 of the RHC. This judgment found favour with the Court of Appeal in *Yupaporn* where, in refusing an application for leave to appeal, Mahadev Shankar JCA in expressing the views of the court said at p 708:

> ... The appellant's counsel submitted that the effect of O 49 r 6(3) of the SCR was to dispense with the need for a memorandum of appeal since the appeal was merely by way of a rehearing of Webb's application and there had been no trial since this was an interlocutory application.
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> The trial judge did not agree and dismissed the appeal with costs. In order to mount an appeal against this decision, the appellant has come to us for leave.
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> Before us, appellant's counsel made the same submission she made in the court below. It did not find favour with us.

A The issue is admirably covered in *Sykt Kayu Bersatu Sdn Bhd & Ors v UMV (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 by Richard Malanjum J. We entirely agree with what he said.

Although O 49 r 6(3) could have been more clearly worded, it cannot be understood to mean that it has abrogated the requirement of O 55 r 2 of the Rules of the High Court 1980.

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The Court of Appeal further observed that the appellant ought to have applied for an extension of time to file the memorandum of appeal and decided that, in the circumstances, it was not a fit case to give leave to appeal. The observations made by the court on the need to file a memorandum of appeal in an appeal under O 49 r 6 of the SCR has been C regarded as having a binding effect as seen in some High Court judgments and as made evident by the application now before me.

Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd [1996] 2 CLJ 1038 is another case where in an appeal under O 49 r 6 of the SCR, the memorandum of appeal had not been filed. Learned counsel for the D respondent submitted before Abdul Kadir Musa JC (as he then was) that the failure to file the memorandum of appeal was in breach of O 55 r 2 of the RHC based on *Yupaporn*. The respondent also relied on *Sykt Kayu Bersatu*. In his reply, learned counsel for the appellant contended that O 49 r 6 of the SCR is an independent provision governing appeals from E decisions on interlocutory applications and was not affected by O 55 r 2 of the RHC. Abdul Kadir Musa JC (as he then was) referred to *Yupaporn* and said at pp 1044–1045:

> At this juncture, permit me to emphatically stress here that, since *Yupaporn*'s case is the decision of the Court of Appeal, and the main issue decided F thereto was an appeal arising from O 26A SCR application, unless and until the said decision has been overruled by a higher court or distinguished by a court of co-ordinate jurisdiction, I am bound to follow that decision based on the principle of stare decisis. Entertaining that fact, I am of the most humble view and stand to be corrected by the higher court. I should not blanketly accept the principle of stare decisis if it can be demonstrated that Richard Malanjum J's decision can be distinguished, and/or shown not to G have been adequately dealt with in relation to the effect(s) of the aforesaid two orders. It must be so, because it is not the decision of the appellate court that I am distinguishing, but a decision of another High Court sitting in Sarawak. It is with this in mind that I will endeavour to distinguish the said *Sykt Kayu Bersatu*'s case with what I consider as to how those two orders ought to be viewed, and consequentially the necessary ruling(s) as to H Cik Chew's [counsel's] objection.

His Lordship then said that both the SCR and RHC are subsidiary legislation having statutory force and went on to examine the scope of O 49 r 6 of the SCR in its proper perspective and said at pp 1050–1051:

I > If O 55 r 2(1) of the RHC is to be examined more closely, it can be seen clearly that, the need to file the memo as stated thereto, only applies to appeals arising from matters in relation to O 49 rr 2(4) and 3(2) of the SCR where Form 141 has to be issued by the court where the notice of appeal in Form 140 was filed. In practice, since the amendment to O 49 of the SCR

was effected, the court concerned will inform the appellant, either on its own or when asked for, that, neither the notes of evidence nor the grounds of judgment will be issued to the appellant; that is to say, Form 141 will not be issued by such court since 1 August 1993. Without being supplied with such materials, I cannot visualize how the memo can be prepared, save aside to file the same as required by O 55 r 2(1) of the RHC. It must have been tailored to that situation when the SCR was amended by inserting r 6 to O 49, the phrase 'notwithstanding anything contained in this Order' was included in sub-rule (1) of the said r 6. By so doing, it provides a special procedure in respect of any appeal against any 'summary' or 'interlocutory' decision of a subordinate court ... .

I had occasion to consider the issue raised in this case in *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 where I expressed agreement with the conclusion reached by Abdul Kadir Musa JC (as he then was) that in an appeal under O 49 r 6 of the SCR, the need to file a memorandum of appeal does not arise. With regard to the binding effect of *Yupaporn,* I said in *Vong Ban Hin* at pp 858–859:

> However, it may not be out of place for me to refer, with respect, to the doctrine of stare decisis which appeared to have caused some uneasiness. It must be realized that the observations made by the Court of Appeal in *Yupaporn* were not made in the course of hearing an appeal but while dismissing an application for leave to appeal. In *Re Craic & Anor, ex p Zietsch* [1944] SR (NSW) 360, Jordon CJ said that where the High Court made no order except to refuse leave to appeal in an application for leave to appeal, it is open to question whether, in strictness, any observation made by the court as to any question of law or fact involved amounts to more than dicta. Furthermore, refusal of leave to appeal against a decision of the High Court by the Court of Appeal, as in the *Yupaporn* case, gives the High Court judgment the same authority as any other unappealed judgment of the High Court. Support for this proposition flows from the House of Lords where Lord Diplock in delivering his speech in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 said at p 214:
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> > 'Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal — neither more nor less.'
>
> It therefore follows that the *Sykt Kayu Bersatu* decision and the decision made in the *Yupaporn* case at the High Court level do not enjoy any elevated status as a result of the observations made by the Court of Appeal. Accordingly, I am of the opinion that the views expressed by Abdul Kadir Musa JC (as he then was) in the *Pembinaan Nadzri Sdn Bhd* decision that in an appeal under O 49 r 6 of the SCR there is no need to file a memorandum of appeal do not impinge upon the doctrine of stare decisis in any way. As *Pembinaan Nadzri Sdn Bhd* had declined to follow *Sykt Kayu Bersatu* which is a decision of a court of co-ordinate jurisdiction, the former must be taken to be the law with which I am in full agreement.

Then came *Perdana Finance Bhd v Azmi Ahmad & Ors* [1997] 2 CLJ 325 where Hishamudin Yunus J held that *Yupaporn* '... is an authoritative decision which the magistrate's court as well as this court are bound to

follow, in conformity with the doctrine of precedent ...'. In declining to follow *Pembinaan Nadzri,* his Lordship said at p 333:

> With the greatest respect, I must humbly confess here that I do find the above reasoning, as a method of dealing with a binding precedent (ie the decision in *Yupaporn*), rather difficult to follow. I must humbly admit that I am unable to appreciate the rationale (or what is the relevance) for his Lordship to place so much emphasis on only an 'observation' (to use the very word used by his Lordship) made by the Court of Appeal on *Sykt Kayu Bersatu,* and I am unable to appreciate why his Lordship took pains trying to 'distinguish' that case [*Sykt Kayu Bersatu*] or to show that O 55 r 2 and O 49 r 2 'not to have been adequately dealt with' by Richard Malanjum J. With the greatest respect, and if I may be permitted to ask, did not the Court of Appeal in *Yupaporn,* apart from making the observation on *Sykt Kayu Bersatu,* also deliberate and give its own opinion on the interpretation of O 55 r 2 and O 49 r 6? And is this not the most important part of the Court of Appeal's judgment that merits attention?

With regard to my ratiocination on the effect of *Yupaporn,* Hishamudin Yunus J said in the same case at pp 334–335:

> However, there is the relatively recent High Court decision in *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 that views *Yupaporn* in a different light. The learned judicial commissioner in that case opined that what was said by Mahadev Shankar JCA (who delivered the judgment of the Court of Appeal) in *Yupaporn* on the interpretation of O 55 of the RHC and O 49 r 6 of the SCR and the need to file the memorandum of appeal was mere 'observation'. The learned judicial commissioner further held that, as the Court of Appeal was dealing with an application for leave to appeal, (to quote his Lordship — at p 858):
>
> > '... it is open to question whether, in strictness, any observation made by the court as to any question of law or fact involved amounts to more than a dicta.'
>
> With the greatest respect, in the light of my views above regarding what I consider to be the ratio decidendi in *Yupaporn,* I am unable to agree with this opinion. In my view, the stand adopted by the Court of Appeal on the interpretation of O 55 of the RHC and O 49 r 6 of the SCR is not a mere 'observation' or an obiter dicta. Indeed, the opinion expressed by the Court of Appeal on these provisions constitutes the very basis of the court's decision. It is true, however, as pointed out by the learned judicial commissioner, that the Court of Appeal was dealing with an application for leave to appeal. But, with respect, I fail to see how this fact can have a bearing on the status to be given to the ratio decidendi of that case.

With the utmost respect, it is my misfortune to say that I am not persuaded to depart from the views that I had expressed in *Vong Ban Hin* on the effect of observations made by a court in refusing leave to appeal. The mere extraction of what is said to be the 'ratio decidendi' of *Yupaporn,* with respect, leaves unanswered the central theme of *Vong Ban Hin* contained in the passage from that case that I have reproduced earlier. What I said in *Vong Ban Hin* will become clear upon an appreciation of the function of a court in hearing leave applications. In this regard, I refer to the White Book 1997 where it is stated at p 1023:

> The Court of Appeal will grant leave if they see a prima facie case that an error has been made (see (1907) LTJ 202) or if the question is one of general principle, decided for the first time (*Ex p Gilchrist, Re Armstrong* (1886) 17 QBD 521, per Lord Esher MR, p 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes LJ in *Buckle v Holmes* [1926] 2 KB 125 at p 127). Generally, the test which the court applies is whether the proposed appeal has a reasonable prospect of success.

Thus, in allowing or refusing leave to appeal, the court considers whether the proposed appeal has a reasonable prospect of success. Where leave to appeal is refused, what in fact the court is saying is that there is no reasonable prospect of the appeal succeeding. In so making an order, the court itself does not make a decision on the appeal. The decision that the court makes is whether or not to grant leave to appeal and it does not amount to a decision on the merits of the case. As there is no decision on the appeal on merits, the question of any ratio decidendi flowing from what was said in the course of refusing leave to appeal does not arise. After all, the meaning of ratio decidendi as stated by Hishamudin Yunus J in *Perdana Finance Bhd* at p 330 is:

> ... the material facts of the case plus the decision thereon ... .

I feel more convinced now in the stand taken by me in the light of the recent judgment of the Court of Appeal in *Penang Port Commission lwn Kanawagi all Seperumaniam* [1997] 2 MLJ 300 (per Lamin PCA, Abu Mansor and Ahmad Fairuz JJCA) where Ahmad Fairuz JCA in writing for the court said at pp 306–307:

> ... Mengenai permohonan penentang untuk kebenaran merayu dari Mahkamah Persekutuan, peguam terpelajar penentang menekankan bahawa Mahkamah Persekutuan tidak membuat keputusan atas merit. Beliau selanjutnya menyatakan bahwa keengganan Mahkamah Persekutuan memberi kebenaran bukanlah bererti bahawa penghakiman Mahkamah Rayuan itu betul (refusal of leave is not affirmation that the judgment of the Court of Appeal was correct). Dalam hal ini, kami berpendapat bahawa penolakan permohonan penentang untuk kebenaran merayu oleh Mahkamah Persekutuan tidaklah boleh dikira sebagai suatu keputusan Mahkamah Persekutuan atas merit isu bidang kuasa Mahkamah Rayuan itu kerana di dalam sesuatu permohonan untuk kebenaran untuk merayu, Mahkamah Persekutuan secara amalinya menimbangkan sama ada wujud atau tidak persoalan undang-undang yang melibatkan kepentingan awam. Oleh yang demikian, kami berpendapat tidaklah boleh diterima penghujahan peguam terpelajar perayu yang mengatakan bahawa mahkamah ini adalah terikat dengan keputusan yang dibuat oleh Mahkamah Persekutuan itu.

The timely enunciation of the law by the Court of Appeal that the dismissal of an application for leave to appeal by a court cannot be taken as a decision of that court on merits, thereby it has no binding effect. This means that there is no way in which any ratio decidendi can lawfully be culled from anything said by the court while making the ruling. The reasons given by a court in refusing or giving leave to appeal serve a limited purpose. This was explained by Lord Woolf MR in *Smith v Cosworth*

Casting Processes Ltd, The Times 28 March 1997 (CA), available on Lexis, in the following terse terms:

> When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. Where leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave. There may be only one issue that the judge or judges giving leave felt it was necessary to draw to the attention of the parties and the court hearing the appeal. It is a misconception to assume that because only one aspect of the proposed appeal was mentioned in any reasons which were given, that leave was granted under a misapprehension that there were not other issues to be determined on any appeal unless the reasons make this clear.

In the circumstances, it is my firm view that this appeal is properly before the court and, accordingly, the preliminary objection taken by learned counsel cannot be sustained.

Preliminary objection dismissed.

Reported by Kanesh Sundrum